No. 2750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARTIN H. A. ELVERS and FREDERICK A. E. ZIMMER,

Appellants,

vs.

W. R. GRACE & COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
GOLDEN W. BELL,
Proctors for Appellants.

Filed this.....day of October, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Introductory.

This is a case of damages in the nature of demurrage incurred by a foreign shipowner, under a charter of his vessel to W. R. Grace & Co. of San Francisco, under which the vessel was to be loaded on Puget Sound or in British Columbia. The facts show that, after the foreign vessel arrived at the port of call of Royal Roads, Vancouver Island, the charterer, instead of directing her to a loading port, where she was to take the charterer's cargo of lumber on board within the period stipulated in the charter-party, kept her waiting at the port of

(N. B. All page references are to the Apostles.)

call, thereby causing a wrongful detention of the ship, and that later, when the vessel finally reached her loading mill, the charterer failed to send his stevedore there (whom it was the charterer's right and duty to appoint under the charter-party), which contributed further to her detention beyond the time allowed the charterer by the charter-party. From the evidence the court will have no difficulty in finding that, even after the vessel commenced loading, the mill had not sufficient cargo ready and was compelled to spar for time; that the mill, to promote its own interests, took advantage of the foreign master's unfamiliarity with the localities on Puget Sound, and with the language; and that the case before the court is a clear and, indeed, aggravated case of sacrificing the time of the ship in order to serve the interest of the shipper. It is a flagrant case of playing fast and loose with helpless shipowners who were thousands of miles away and not in a position to protect themselves. There is no conceivable defense in justice or equity under the facts. Respondent has, however, introduced the technical defense of the cesser clause. This defense was first introduced by exceptions to the original libel, which exceptions were in due course overruled by His Honor, Judge De Haven (Apostles, p. 21). Later, at the trial, respondents again took advantage of the same technical defense before His Honor, Judge Dooling, who overruled Judge De Haven's decision and sustained the exceptions, apparently with reluctance (p. 133). It is submitted

that, in the construction of the cesser clause, libelants are entitled to the benefit of every doubt in view of the aggravated injustice which would result from the present decision.

The principal question on this appeal is the question of law, whether the cesser clause in this case constitutes a defense to libelants' action, one judge below having answered this question in the negative, the other in the affirmative, After this question is once decided in favor of libelants' contention, it matters little whether the case is remanded for final judgment on the facts to the lower court, or whether it is finally decided by the court on this appeal; but we submit most earnestly that the record before this court shows with conclusive fullness that libelants are in law and justice entitled to a decree for the full amount of their damages, and that this court is in a position to render such a decree without remanding the cause to the lower court for further action.

Statement of the Facts.

1. On August 16, 1906, libelants, the owners of the steel ship "Schwarzenbek", chartered the ship to respondent. The charter-party provided for a voyage with a full cargo of lumber from a mill or loading place on Puget Sound, or in British Columbia not north of Burrard's Inlet, as might be directed by charterers, to Callao direct. It was also

provided that the charterer should give orders as to the mill where the cargo was to be loaded *within forty-eight hours* (Sundays and legal holidays excepted) *after the charterer had received notice of the arrival of the vessel* at Port Angeles, Port Townsend, or Royal Roads, *"failing which lay days to count."*

It was further provided that thirty working lay days should be allowed respondent for loading the vessel, and that said lay days were to commence twenty-four hours after the vessel should be at the loading place satisfactory to the charterer, inward cargo and necessary ballast discharged and ready to receive cargo, the master having given written notice to that effect. It was further provided that the charterer's stevedore should be employed, although the cargo was to be stowed under the master's supervision and direction.

It was further agreed that discharge should be given with dispatch according to the custom of the port of discharge, and that for every day's detention by the fault of the charterer the latter should pay demurrage at the rate of 3d sterling per register ton per day.

2. On March 2, 1917, the vessel arrived at Royal Roads. Not finding any orders as to loading mill, the master wired to respondent on the same day for such orders. This wire, in the ordinary course, should have been received earlier, but is admitted to have been received by respondent on March 4th,

at 4:30 P.M. *No orders or instructions of any nature whatever as to loading mill were given by charterer within forty-eight hours thereafter.* Finally on March 6th, at 5:45 P.M., respondent wired: "We will load your ship Millside." Not knowing to which millside to proceed (p. 179), (there being numberless millsides on Puget Sound, or in British Columbia not north of Burrard's Inlet), the master sent another wire, and, on March 7th, received the laconic answer: "Millside, Fraser River." The distance from Royal Roads to the millside designated is over 120 miles (p. 98); the "Schwarzenbek" proceeded there in tow and arrived at the loading mill on March 11th, at 2 P.M.

3. On March 13th, at 11 A.M., the vessel's inward cargo and necessary ballast were completely discharged (pp. 180, 176); she was ready to receive her cargo, and her master gave his notice of readiness to load (p. 180). The duty of loading the cargo rested upon Fraser River Sawmills, Limited, a corporation (deposition of A. J. Stewart, p. 93; also p. 184). On arrival at the mill the master found no stevedores there, although he was by his contract obliged to employ the charterer's stevedores for loading; he therefore wired to respondent on March 11th, asking respondent to nominate its stevedore. Respondent replied, on March 12: "Bartlett Stevedore." To a stranger in these regions this was, of course, not very illuminating; the master therefore was obliged to ask again for instructions, and on March 12th received the wire:

"As wired this morning Bartlett Port Townsend will stevedore per charter" (p. 185). As Port Townsend was over 100 miles from the loading place, and no Bartlett made his appearance, the master, on March 13th, wired to respondent: "Now Millside three days still awaiting stevedore. Will hold you liable all expense and delay"; and on the same day he wired to Bartlett, at Port Townsend: "Ready but no stevedore here yet. Advise" (pp. 189-190). In answer to the telegram to respondent, the latter wired, on March 14th: "Communicate with Bartlett. We are not concerned in arrangements beyond nominate responsible stevedore who will load according to charter." Stevedore Bartlett never did appear; but on March 15th, he wired to the Captain: "Capt. E. W. Renny will load your ship for us." Renny turned out to be a stevedore at Vancouver, B. C., a place only about 17 miles from the loading mill, but, during the following three days, neither Bartlett nor Renny, nor any other stevedore, made his appearance at the mill. Therefore, on March 18th, the master wired again to respondent: "Still waiting stevedore;" and, on March 19th, he wrote to Capt. C. W. Renny, at Vancouver, asking him whether he intended to stevedore the vessel, and notifying him that, if he did not intend to do so, he would have to make other arrangements (Respondent's Exhibit E, Apostles, p. 223). At last, on March 21st, Capt. Renny and his stevedores arrived and, on that day, put up the loading gear. The loading of the cargo commenced on the following day, March 22nd.

4. If the lay days, as provided in the charter-party, commence to count on March 7th, while the ship was waiting for directions at the port of call, she would have been completely loaded, under her allowance of thirty working lay days, on April 12th. Under this calculation the unwarranted detention of the vessel, for which respondent is responsible under the charter-party, extended from April 13th to May 15th, when the loading was completed, being a period of 33 days ship's time unlawfully used by the charterer.

If, however, the lay days are counted from March 14th, when the ship was at the port of loading and actually ready to load, she would have been completely loaded, under her allowance of thirty working lay days, on April 19th. Under this calculation the period of detention extended from April 20th, to May 15th, or 26 days.

In fact the ship was not completely loaded until May 15th, as the work of loading, after the stevedores had finally commenced their work, was interrupted by a stevedore's strike, which began on April 23d, and ended on May 11th.

5. The evidence shows that the detention of the ship, first at the port of call, where she was waiting for respondent to name her loading mill, and later at the loading mill, where she was waiting for respondent to send charterer's stevedore, was in fact due to the fault of the loading mill, the shipper of the cargo, rather than to the fault of the charterer. Under the contract of charter-party libelant's deal-

ings were, of course, to be carried on with the charterer alone, and the inside facts which might throw interesting side lights on this case and would account for the unconscionable waste of the ship's time, are within the exclusive knowledge of the millowners, the real defendants of this case, who have carefully refrained from disclosing them. In spite of libelants' numerous demands for copies of the correspondence with the mill, only few documents found their way into the record. But some significant facts *are* disclosed by the record, from which it is proper to infer other pertinent facts. The testimony of the master shows that the cargo was not ready when the ship arrived at the loading mill (p. 181). The reports of H. D. Hylton, respondent's agent at the mill, who superintended the loading of the cargo, show that the loading was retarded and sometimes suspended by reason of the fact that the mill could not furnish enough lumber to the ship. On April 11th, he writes to W. R. Grace & Co.: "I do not believe that the mill will be able to cut enough to keep up with the loading as they are working on several other orders" (App. p. 193). An April 13th, he reports: "We worked ship only one hour today as we ran out of lumber this morning. * * * The mill has not cut very much for us today as their merchantable logs have not yet arrived. Expect to begin work again Monday morning" (pp. 193, 194). On April 20th, he writes: "Have only worked about 36 hours this week as mill has not been able to cut lumber but

they did better last of the week as were in better logs" (App. p. 195). Again, on April 24th, he reports: "We have loaded no lumber on ship 'Schwarzenbek' this week as the mill did not have much ahead on Monday morning and the stevedore worked men on steamer 'Georgia'" (App. pp. 195, 196). From these excerpts of reports of the loading, made to charterer by its agent, it appears that the loading mill was not ready with the cargo and was responsible for the detention of the ship. The affidavits of William P. Fowle, Manager of the Fraser River Sawmills, improperly in the record (pp. 68 and 71) show the subterfuges by which the mill attempted to "stall" the loading.

Very significant in this connection is the deposition of A. J. Stewart, taken on behalf of respondent. He was foreman of the mill at the time when the ship was loaded (p. 93) and looked after the "cutting of the lumber for her". It could certainly be expected that respondent would show by *his* testimony that the "Schwarzenbek's" cargo was ready for her when she arrived at the loading mill. But there is not one word in his testimony to show that any cargo was ready for her before March 21st. He states in answer to the question: "What was the first day on which the mill had sufficient lumber ready for loading the said ship?" (Interrog. 19, p. 115), that "The mill was ready to deliver whenever the ship was ready" (p. 100), and as the ship, *according to his distorted notion,* was ready on "21st March, 1907", the plain inference is that the

first day on which the mill had sufficient lumber ready was March 21st. This testimony on the part of the man who was charged with furnishing the cargo accounts for the *reason* why, when the ship arrived at Royal Roads, the loading mill was not disclosed to her master, and why, after the vessel arrived at her loading place, on March 11th, she was kept waiting for the stevedores until March 21st.

The real facts with reference to the loading are in the exclusive possession of the parties who loaded the ship; but the evidence, so sparingly disclosed by our real opponents, shows plainly that this is an action against W. R. Grace & Co. only pro forma, and that the real party defendant in interest, as responsible for the detention which caused the damages to libelants, is the mill company which loaded the cargo. In reality the liability involved in this action is not a charterer's liability at all, but the liability of a third party with whom libelants had no contract. It is proper for the court to weigh this fact in the balance, and to consider that cesser clauses in charter-parties are intended to protect charterers, and not wrongdoers who hide behind the skirts of the charterers.

The Two Decisions of the Lower Court on the Effect of the Cesser Clause.

1. The libel was filed on February 18, 1909. On March 10, 1909, respondent filed exceptions to the

libel, contending that the libel did not state a cause of action against respondent, by reason of the cesser clause in the charter-party (p. 20). After hearing argument on October 16, 1909, and upon due consideration by the court, the court, by the Honorable John J. De Haven, Judge, overruled these exceptions on November 17, 1909, and respondent was allowed ten days to answer the libel (pp. 2, 3, 21).

2. The hearing of the case in the lower court took place on June 9, 1914. After the testimony was presented, libelants, at the close of the trial, moved the court to amend the libel to conform to the proofs made at the trial, which motion was granted. The amended libel was filed on June 11, 1914. On July 1, 1914, exceptions to the amended libel were filed, on precisely the same grounds as the exceptions to the original libel, and raising the same issue of the cesser clause (p. 127). Thereafter, on May 17, 1915, the lower court made an order sustaining the exceptions to the amended libel (p. 137), and on June 3, 1915, a decree was entered sustaining the said exceptions and dismissing the amended libel (p. 147).

In its opinion the lower court said:

> "As the libel is against the charterers in personam, exceptions have been filed to it, on the ground that it states no cause of action against respondents, the charterers, *because of the cesser clause in the charter,* but that libelants' only remedy is an action in rem against the cargo. *The action was, however, fully tried,* and these

> exceptions are taken to an amended libel filed at or about the close of the trial. Similar exceptions taken to the original libel were overruled by the former judge of this court. The high regard which I have for the late Judge De Haven's learning has caused me to hesitate long before deciding that the exceptions to the amended libel are well taken. But a careful study of the English and American cases in which the effect of so-called cesser-clauses has been passed upon has led me to the conclusion that under the provisions of this charter the cesser clause is effective."

Here, then, we have two divergent views and opposite rulings by two judges of the lower court on a pure question of law. We contend that the "cesser clause" in this case does not bar libelants' action against the respondent. If the court is with us on this issue of law, we feel absolutely certain that on the merits the case will be decided in libelants' favor, whether the final decision be rendered in this court, or the cause be remanded to the lower court for further action; for there never was a case where justice demanded more loudly redress for a commercial injury.

In taking this question into consideration we request the court to give proper weight also to the fact that the *reason* for the presence or application of a cesser clause is entirely absent in this case, even if the fact that the guilty party is one standing behind the back of respondent were left out of consideration. The charter was made on the printed form of charter-parties of W. R. Grace & Co. In

many transactions of a mercantile firm such a clause is of great value; but it is not intended, even as between shipowner and charterer, for transactions such as the one disclosed by the evidence. The presumed purpose of the cesser clause is, as stated by Judge Brown in *Burrill v. Crossman,* 65 Fed. 104, 106,

> "to relieve the charterer from the responsibilities attending a discharge of cargo to purchasers in distant ports. * * *"

In this case the respondent was not only the charterer of the ship, but also the consignee of the ship at the port of discharge, besides being the consignee of the cargo under the bill of lading, and having a branch house in the distant port of discharge, and therefore being more at home there than at the port of loading. Respondent controlled both the loading and the discharging of the vessel. As consignee of the ship at Callao, respondent bore, for a commission, all the responsibilities of the discharge of the cargo; not only had respondent no desire to relieve itself from such responsibilities, but found it attractive, for commercial reasons, to burden itself with the responsibilities attending the discharge of the cargo in the distant port. And as consignee of the cargo, respondent had a special interest in having the cargo discharged and taking it into its own possession.

Libelants' Points and Authorities.

I. PRINCIPLES OF CONSTRUCTION OF THE CESSER CLAUSE.

1. "A clause known as the 'cesser clause' is sometimes inserted in the charter-party. It usually provides that the charterer's responsibility shall cease when the vessel is loaded *and bills of lading are signed,* and although this clause will ordinarily be given effect and exempt the charterer from responsibility for delay occurring subsequent to loading, but not before, it is always subject to and controlled by the other provisions of the charter-party and bill of lading."

36 Cyc. 352.

2. The charter-party in this case, after providing for the loading and discharging of the cargo, contains a cesser clause which reads as follows:

> "Vessel to have a lien on cargo for all freight, dead freight, and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine *as soon as the cargo is on board;* all questions, whether of demurrage or otherwise to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose."

The language that the "liability of the charterers shall cease and determine as soon as the cargo is on board" is ambiguous. It may be that the charterer was to be entirely exonerated, as soon as the cargo was loaded, both as to past breaches of contract, and as to future possible breaches; or it may be that, whereas he would have been liable for breaches of contract prior to the loading, yet, as soon as the

cargo was on board, the shipowner should look to the consignee with respect to all things touching the completion of the contract, and not to the charterer. Which of the two meanings is the more probable? The shipowner could know nothing of the consignees at Callao; not until after the cargo was loaded and the bills of lading signed would he know them to be persons of substance, possessing valuable property on board his vessel; but he would, nevertheless, be under practically insuperable difficulty in proving his case against unknown persons in Callao in respect of delay occasioned to his ship while in Puget Sound, and would be obliged to sue them in a foreign court where his lien might be of no substantial value. The words used in the cesser clause are certainly not clear enough to relieve respondent as charterer from *liability incurred before any cargo was on board,* much less from liability for damage caused to the ship before a loading place is named; hence the principle applies that, "when parties mean to get rid of liability they should take care to use *clear and unmistakable language,* and should put into their agreement words as clear as those in the case of *Oglesby v. Yglesias* (Blackburn, J., in *Christoffersen v. Hansen,* 1 Asp. 308)." In the *Oglesby* case it was expressly stipulated that the liability should cease "as to all matters and things *as well before as after the shipping of the cargo*". In the absence of such words the ambiguity should be resolved against the party seeking to get rid of liability for wrongful

acts. If it be argued that the language "all and any liability of the charterers under this agreement shall cease and determine" is broad enough to include such liability as is the subject matter of this suit, we call the attention of the court to the answer of Blackburn, J., to a similar argument in the *Christoffersen* case above cited. When counsel in that case argued that "liability" as well before as after (the loading) cannot mean more than 'all liability' ", Blackburn, J., answered: "But on the other hand 'all liability' may mean something less".

Furthermore it is to be noted that the words "all and any liability of the charterers" refer to liability connected with "freight, dead freight, and demurrage" and consequently to liability connected with cargo, and not to liability for damages caused by failure to designate a loading port.

3. The cesser clause in a charter-party must be strictly construed against the charterer (*Hughes, Admiralty,* p. 165; *Compania La Flecha v. Brauer,* 168 U. S. 104, 118).

In

Clink v. Radford (1891), 1 Q. B. 627,

Lord Esher said:

> "The main rule as to the interpretation of the cesser caluse in a charter-party which I gather on looking at the cases is that, unless the cesser clause is expressed in terms so clear that it cannot be got rid of, the court will always be inclined to construe it so as not to apply to the particular breach complained of, *if by so doing the owner is left unprotected against every one else.* In other words, it cannot be assumed that

> the owner would by the cesser clause give up, without any mercantile reason at all, rights stipulated for in the contract. If that be true, then the matter * * * depends on whether, if the cesser clause be applied to the particular breach complained of so as to free the charterer, we can find *that with regard to this particular breach the owner has a remedy for his loss against some one else.* If this is so, we should construe the cesser clause in its fullest possible meaning, and say that the charterer is released; but if it is found that by so construing it, the owner would be left without any remedy against any one else, then we must say that the cesser clause could not have been intended to apply to such a breach."

If the decree of the lower court stands, the cesser clause in respondent's charter-party protects respondent from liability for its breach of contract, and the innocent shipowners are left without any remedy for their loss.

We ask the court to interpret this technical clause in the spirit of Lord Esher's remarks, which leads to the juster result of leaving the wrongdoer responsible for the loss deliberately inflicted upon the shipowner.

Lord Esher's rule of construction is approved in *Schmidt v. Keyser,* 88 Fed. 799, *800,* on appeal before the Circuit Court of Appeals of the Fifth Circuit.

This court, in *Dewar v. Mowinckel,* 179 Fed. 355, adopted the rule that

> "the cesser clause is to be construed, *if possible, as inapplicable to a liability with which the lien is not commensurate",*

a rule now settled since the decision of the Supreme Court in *Crossman v. Burrill,* 179 U. S. 100.

The rule is summarized by the Supreme Court in the following words:

> "In a charter-party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate" (p. 108).

We shall show that the "lien on cargo for demurrage", in this case, is not commensurate with the liability on which the suit is based, and that, consequently, the cesser clause is inapplicable to this case. The following principle of construction applies:

> "Where a merchant seeks to use an ambiguous cesser clause in an oppressive manner, for instance when he requires the master and shipowner to settle in some distant place a dispute which could be better settled when and where it arises; or offers an illusory lien to replace what is taken away by the cesser clause, the fair and reasonable intention of the parties, which is to be presumed, may probably be better carried out by giving a *strict construction* to the cesser clause."
>
> *Abbott, Merchant Shipping,* 14th ed., p. 451.

In the case at bar respondent required the German master and shipowner to settle at Callao a dispute which can certainly be better settled in an American court. It may also be conclusively presumed that a lien to be enforced by a German master

in a Peruvian court is an illusory substitute for a claim against an American firm to be decided by a court of its domicile.

4. The object of the cesser clause in a charter-party is to define the point of time when the liability of the charterer is to terminate, and the liability of the consignee of the cargo to commence. The latter liability is substituted for the former. The clause is, therefore, predicated upon the bill of lading between the charterer and the consignee of the cargo, and is intended to apply only to cases where charterer and consignee are distinct persons. The intention is that the charterer shall not continue responsible for the performance of the charter-party after he has provided the agreed cargo, but that the shipowner shall have his remedies under the bills of lading only, and against the consignee of the cargo (*Carver*, Sec. 645).

The intention to draw a dividing line between the liability of the charterer and that of the consignees appears with unusual clearness in the form of the cesser clause used in the charter-party in suit; for it is there expressly agreed that "all questions, whether of demurrage or otherwise," are "to be settled with the *consignees*", the liability of the charterers having ceased. Such an agreement, obviously, was not intended to have, nor does it have, any application to a case like the one at bar, where there is no distinct consignee, but where charterer and consignee are the same person.

5. For another reason the clause was not intended to be invoked in a case like the one at bar. The purpose of the cesser clause is to protect a charterer who, in making the charter-party, acted as local agent for a foreign principal, and who, after he has placed the cargo on board, wishes to wash his hands of the whole transaction and to relegate the shipowner to the principals for whom he shipped the cargo (*Scrutton, Charter-parties,* p. 14).

> "A merchant who deals in commodities which are commonly sold in entire cargoes while they are afloat may find it worth while to take a comparatively smal profit or commission on a large transaction, if he can limit his responsibility to such part of the transaction *as he can control personally,* which is generally the loading."
>
> *Abbott,* 14th ed., p. 448.

Judge Brown, in *Burrill v. Crossmann,* 65 Fed. 106, states the "presumed purpose" of the cesser clause to be "to relieve the charterer from the *responsibilities attending a discharge of cargo to purchasers in distant ports".*

In the present case, respondent was charterer of the ship, consignee of the ship at the port of discharge (charter-party, cl. 89), and consignee of the cargo (libel, art. VI, not denied); the bill of lading was forwarded to the branch house of respondent at Callao (p. 65), and respondent, by its agent at Callao, had control of the discharge of the cargo. Respondent had personal control of the whole transaction from the time when the ship arrived at

Royal Roads until the time when she was finally discharged at Callao; granting, therefore, that respondent's responsibility should be limited to such part of the transaction as it could control personally, such a limitation would maintain and continue its responsibility throughout the whole transaction involved in this cause, and far beyond the time when the cargo was on board. Respondent was not a local agent for a foreign principal in loading the ship, but had assumed the responsibilities attending the discharge of the cargo at Callao. The provision of the charter-party "that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board", if invoked by respondent, is in conflict with the duties voluntarily assumed in its contract and imposed by law upon the respondent as consignee of the ship, owner of the cargo and holder of the bill of lading. Even if a lien had been filed against the cargo by the master at Callao, the ultimate liability for its enforcement would have fallen on respondent. The personal liability of respondent under the charter-party could not, by valid agreement, be cut off "as soon as the cargo is on board"; such an agreement would in effect be an ouster of jurisdiction, and as such against public policy (*Carver,* p. 856).

II. THE PARTICULAR CESSER CLAUSE DOES NOT RELIEVE RESPONDENT.

A. Because It Does Not Apply to a Liability Accruing Before the Loading of the Cargo.

(a) By *strict* construction the charter-party provision for "demurrage", referred to in the cesser clause, applies only to *discharge* of the cargo.

The clause gives the vessel a "lien on cargo for demurrage" (p. 16), and "demurrage" is defined in the following connection:

> "*Discharge* to be given with dispatch according to the custom of the port of discharge at such safe wharf, dock or place as charterers may direct, but at not less than 35,000 feet B.M. per day. For each and every day's detention by the fault of party of the second part or agent, they agree to pay to the said party of the first part, *demurrage* at the rate of three pence sterling per register ton per day" (pp. 14-15).

From such construction it would follow that it was the intent of the cesser clause to relieve the charterers only from demurrage at the port of Callao, the discharging port. Such intention would be in consonance with fair business convenience, as it is to be presumed that the charterer, in an ordinary case, prefers to end his liability as charterer after he has loaded his cargo. This would be in consonance with the rule stated in *36 Cyc.,* 352, as follows:

> "This clause will ordinarily be given effect and exempt the charterer from responsibility for delay occurring subsequent to loading (cit-

ing authorities in note 35) *but not before"* (authorities in note 36).

(b) Assuming the demurrage clause to apply to cases of detention in *loading as well as discharging,* nevertheless the cesser clause does not apply to the case at bar, because this is not a case of demurrage either in loading or in discharging. The libelant sues respondent for wrongs done to his ship *before the loading commenced.* The charterer's liability arises in the first place from the deliberate waste of the ship's time in detaining her at Royal Roads and failing to declare the loading mill and to send the ship to a place where the cargo was to be put aboard. The injury to the ship, and corresponding liability of respondent, were aggravated by the waste of the ship's time resulting from the failure to send the charterer's stevedore to the place of loading. Neither of these liabilities arises from "demurrage" within the definition of the charter-party. As above contended, a strict construction of this instrument confines the subject of demurrage to *discharge* of the cargo. If a wider construction be adopted, delay in loading could be included among the cases for which demurrage is provided; but no proper construction could extend the application of the agreed demurrage to any torts or breaches of contract occurring at periods not connected with either the loading or discharging of the cargo. By the charter-party the earliest point of time when ship and cargo came into contractual relations with one another is defined as

> "twenty-four hours after vessel is at loading place satisfactory to charterers, inward cargo and/or unnecessary ballast discharged and ready to receive cargo, Master having given written notice to that effect" (charter-party, cl. 52).

The point of time thus defined occurred on Wednesday, March 13th, at 12 noon, after the master had given the required notice; hence, even if "demurrage" be extended to apply to loading, it could not be fairly be applied to a period before the beginning of the lay days, or to anything happening before noon of May 13th.

The cesser clause has no force as applied to charterer's liabilities accruing at a time when the ship was uncertain as to whether she would ever receive a cargo; for the charterer has no right to substitute for his liability a lien upon a future, prospective and merely contingent cargo which, as far as the shipowner's position on March 4th was concerned, might never be loaded. When, on March 4, 1907, at 4 P.M., the master of the "Schwarzenbek" had given actual notice to charterers that his vessel had arrived at Royal Roads; when 48 hours had elapsed after this notification, yet the ship had received no orders as to loading mill, the contingent liability of respondent was fixed. The charterer was then under obligation either to furnish a full cargo before April 13th, or, if the vessel should be detained in any loading port beyond April 12, 1907, to pay demurrage day after day from and after April 13, 1907. This liability had no connection

with a cargo which might or might not be in existence ready for the ship in some other port, least of all a port unknown to the owner of the ship. No valid lien could be given to the master or owner upon any cargo without turning the actual possession over to him; it is absurd to attempt to convey a lien, as a substitute for an accrued liability, upon a cargo which the charterer is hiding in an unknown port. The "lien upon cargo" provided for in the cesser clause offered as a substitute for the "liability of the charterers under this agreement" can only apply to cargo in the possession of the ship when the liability arises, and not to a cargo which the charterer has merely agreed to prepare and load in the future. In this case no cargo was in the possession of the ship when the liability arose; there would have been no connection between this ship and a supposititious cargo waiting to be loaded in her in a known but distant port; a fortiori there was no connection between this ship and a ready cargo in an unknown port, and least of all any connection with a merely potential cargo in a potential port.

(c) Assuming the cesser clause to be construed as intended to include demurrage incurred *in loading*, it would be nevertheless ineffective, because there is *no consideration for the cesser agreement.* The cesser clause is inserted in consideration of the granting to the shipowner of a lien, *which he would not otherwise possess,* on the cargo for de-

murrage (*Scrutton, Charter-parties,* p. 141). A lien which the shipowner already possesses, either by previous agreement or in point of law, cannot form the basis of an agreement to surrender his rights. In this case the words: "Vessel to have a lien on cargo for all freight, dead freight and demurrage" convey nothing that the shipowner would not possess in the absence of such a clause.

> "The clause giving a lien for freight and demurrage adds nothing, because that lien *exists by the maritime law of this country without any stipulation.*"
>
> *Davis v. Smokeless Fuel Co.,* 196 Fed. 753 (C. C. A. 2nd Circ.).

There being no consideration for the agreement that the charterer's liability should cease, the agreement is not binding. A cesser agreement affecting *accrued rights* is good in England, where the legal force of the lien granted to the shipowner depends solely upon the agreement of the charterer; but in the United States "it is well settled that the vessel owner has a maritime lien on the cargo of a person responsible for a detention, enforceable in admiralty, regardless of the existence or non-existence of an express contract for a lien" *36 Cyc.,* 371). A legal right is not a sufficient consideration to support a contract; hence the agreement that the liability of the charterer shall cease is not binding, being without consideration.

B. Because the Lien Given by the Cesser Clause Is Not Commensurate with the Charterer's Liability.

It is settled that the cesser of the charterer's liability is co-extensive with the lien given in the charter-party to the shipowners; in other words, the charterer is released from those liabilities only for which a lien is given to the shipowner.

In the case at bar no commensurate lien was given to libelants by the charter-party, for the following reasons:

(a) *The cesser clause in suit leaves it within the power of the charterer to make the agreed lien valueless by the subsequent act of the charterer.*

The clause provides that all liability of the charterers shall cease *"as soon as the cargo is on board."* If, as soon as the cargo is on board, the shipowner is given a valuable lien enforceable at the place of delivery against the consignee, the cesser operates by law; if, on the other hand, the agreed lien has a string to it and may, at the option of the charterer, be defeated, the corresponding cesser or liability has nothing to support it and is not binding on the shipowner. What is the situation of the parties to such an agreement as soon as the cargo is on board? On the one hand from this moment all and any liability of the charterers *ceased and determined.* On the other hand, what had the shipowner received as a sub-

stitute for the liability of the charterers? He received whatever the charterer was willing to give him: a lien of value on the cargo, if the charterer so chose, or nothing if such was the charterer's pleasure. As long as the form of the bill of lading was not settled, the charterer retained the power to nullify the value of the lien which was to be given to the shipowner.

As a matter of fact this is precisely what happened in this case. Bills of lading were presented by the charterer to the foreign captain for signature which made it impossible to enforce any lien against the cargo at Callao. No reference to the damages previously incurred was permitted by the charterer to be inserted in the bill of lading. The effect of this action of the charterer was the following: In case the bill of lading was not indorsed, and W. R. Grace & Co. were the consignees and receivers of the cargo at Callao, they remained liable for the demurrage under the terms of the charter-party. In case, however, the bill of lading was indorsed by respondent to third parties, before arrival of the ship at Callao, the cargo had to be delivered to the holder of the bill of lading at Callao without any means of enforcing a demurrage or damage claim against the cargo. The helpless captain protested in vain against signing the bills of lading presented by charterer, saying, in his letter to respondent:

> "I only do so under protest as I claim demurrage * * * which you have declined

to pay me or to settle with me about" (Respondent's Exhibit "C", p. 217).

On April 20, 1907, the captain filed an official protest in the office of a notary public for the Province of British Columbia, "his vessel having been detained over and above her lay days as set forth in charter-party; and further *protests against signing bills of lading* as he had not been paid demurrage" (Respondent's Exhibit "C", p. 220).

Again on May 16, 1907, the captain, chief officer and sailmaker of the ship filed an official protest before the notary public for said province, in which it is recited that

> "Charterers were telegraphed to by Captain to the effect that he would only sign bills of lading under protest, until his claim for demurrage was paid or acknowledged in writing, it having been refused. * * * Wherefore the said appearers on behalf of the owners of the said vessel * * * do protest * * * against the said charterers, and against their agents, and against all and every other person or persons whosoever responsible, or liable, * * * and holding them responsible and liable for the breach of said charter-party and for all demurrage, damage, injury * * * sustained by reason of said breach, delay, detention or other premises, and will sign bills of lading only under protest as herein mentioned" (Respondent's Exhibit "B", pp. 216, 217).

The record shows that, although the loading was completed on May 15th, the master had refused to sign the bills of lading, and was detained at

Millside, awaiting instructions from his owners in Germany, as late as May 21st, when he wrote to respondent:

> "Under instructions from my owners I am today ready to sign bills of lading as you request, but only do so under protest as I claim demurrage amounting to $2984.72, which you have declined to pay me or to settle with me about. * * *
>
> Herewith is a copy of protest which I have made before a Notary for the reason that *you have prevented my signing bills of lading under protest"* (Respondent's Exhibit "C", pp. 217-218.)

It thus appears that the Captain, in the difficult situation in which he found himself, had attempted to preserve the rights of the owners in the bills of lading, but was prevented by the charterers from doing so. The master's position was further embarrassed by the fact that the vessel, by the charter contract, was "consigned outward to charterer's agent on Puget Sound or in British Columbia" (charter-party, cl. 92), so that he was, in a certain sense, dependent upon the advice and under the control of the very parties who insisted upon the particular form of the bill of lading against which he protested.

These protests were steps intended to preserve the rights of the ship against the charterers; by them the shipowner gave notice to the charterer: you are depriving me of my lien by your insistence upon this bill of lading; hence it is understood

that your personal liability for the unpaid demurrage shall continue.

If the cesser clause had read as follows:

> "all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board *and bills of lading have been issued which adequately protect the lien on the cargo*",

the cesser clause would be effective; but where the bill of lading fails to preserve, by adequate words, the lien which must be substituted as a consideration for the cesser of liability, the cesser agreement would be an attempt to deprive the shipowner arbitrarily of his rights without giving him an equivalent for the deprivation. A frequent form of the clause is: "Charterer's responsibility to cease when the vessel loaded and bills of lading signed." The lien on cargo, after it is placed on board, is of no value to the shipowner as long as the charterer retains the arbitrary power to nullify its enforcement. No effectual lien of value being, therefore, given to the libelants in this case, respondent is liable for the detention at the port of loading and its consequent damages.

In the leading case of *Crossman v. Burrill,* 179 U. S. 100, the cesser clause read: "Charterers' responsibility to cease when the vessel is loaded *and bills of lading are signed.*" No doubt it would be implied that the bills of lading must be *proper* bills of lading, viz., such as preserve the rights of both shipowner and charterer.

In the case of *Schmidt v. Keyser,* 88 Fed. 799 (C. C. A., 5th Circ.), the cesser clause was formulated in these words:

> "The charterer's responsibility under this charter shall cease as soon as the cargo is shipped *and bills of lading signed, provided all the conditions called for in this charter have been fulfilled as provided for in the bill of lading.*"

In that case the court held that the signing of bills of lading did not operate to release the charterers from liability for demurrage accruing prior to the signing of the bills, even though the cesser clause—unlike the one in the case at bar—was sufficient to create the valid lien necessary to support an agreement that the charterer's liability was to cease. The reason for the court's decision was that the bills of lading stated that all the conditions of the charter had been complied with when, in fact, the demurrage claim was pending.

It is clear that unless bills of lading are issued which provide for the conditions called for in the charter, which, for instance, make provision for a demurrage claim which had accrued under the charter, the shipowner's lien on the cargo is lost; and that, therefore, the proviso which constitutes a part of the cesser clause in the case of *Schmidt v. Keyser,* supra, is a term necessarily implied in every valid cesser clause.

(b) *The lien on the cargo, referred to in the cesser clause, was ineffective, because, under the charter-party, the charterer had the right to take or order the cargo out of the possession of the shipowner at Callao before receiving either freight or demurrage.*

The ordinary reason for the existence of the cesser clause in a charter-party is that the charterer desires to wash his hands of ship and cargo as soon as the cargo is on board at the place of loading. He does not care to follow the ship to the port of destination, which may be a foreign port in which he has no connection. The facts in this case show an entirely different condition. W. R. Grace & Co. have a house at the port of destination (p. 65), and stipulated in the charter-party that "*Vessel to be consigned* to charterer's agents at port of discharge" (p. 17). W. R. Grace & Co. were also the *consignees of the cargo* under the bills of lading (p. 10, p. 65). Respondents, in other words, were very much at home at the place of destination, having control there of both the ship and the cargo. Apart from the obvious fact that a German shipmaster would presumably find insuperable practical difficulties, even under the most favorable circumstances, in enforcing a lien upon his cargo at Callao, where respondent had a natural home, where the master was obliged to advise with and follow the orders of respondent as consignee of the ship, and where respondent appeared with the bill of lading claiming the cargo,

it is apparent that the master *under the charter-party, was obliged to deliver his cargo before he could claim even freight.* He was in a worse plight than was the master of the "Rygia" in the case of *Dewar v. Mowinckel,* decided by this court in 1910, and reported in 179 Fed. 355.

In that case this court said:

> "The rule of construction of a charter-party which provides that the charterer's responsibility shall cease on completion of the loading, and also provides that the charterer shall pay freight and demurrage for delay and creates a lien on the cargo for freight and demurrage, is that the cesser clause is to be construed, if possible, as *inapplicable to a liability with which the lien is not commensurate.*"

This court held that, as the charter-party required a discharge of the cargo at a place to be ordered by the consignee, and freight was only to be paid on final discharge, the cargo passed out of the possession of the master, and *"the lien for demurrage, like the lien for freight, is lost* when the cargo is delivered to the consignee". "The lien of a shipowner for freight being but a right to retain the goods until the payment of freight, it is inseparably associated with the possession of the goods and is lost by an unconditioned delivery to the consignee". On these grounds the court held that the cesser clause was not operative under the facts of that case.

In the case at bar the lien is not commensurate with the liability. Respondent had it in its ab-

solute power to cause the cargo to pass out of the possession of the master before he was entitled to any freight; for by the charter-party respondent agreed to pay the charter-freight to the libelants or their agents "in the manner following, that is to say: Fifty shillings (50) for each thousand feet, board measure, *delivered*" (Ap. p. 14). Before libelants acquired the right to receive any freight, they were obliged to deliver the cargo. Again the charter-party provides:

> "Freight payable on the right and *full* delivery of cargo at final port of discharge" (Ap. p. 14).

In other words, every stick of lumber had to be not merely discharged, but *delivered* to consignee, being respondent herein, before libelants had the right to ask for one cent of the charter-freight.

What becomes of the value of the "lien" referred to in the cesser clause, under such circumstances?

(c) *The lien on the cargo referred to in the cesser clause was ineffective because respondent in this case, on account of its capacity of consignee of the ship, had complete control of the discharge at Callao and the power to make the enforcement of the lien not only difficult, but impossible.*

The charter-party provides:

> "Vessel to be consigned to charterers' agent at the port of discharge".

The word "consigned" signifies that the vessel, upon her arrival at Callao, was to be delivered into the care and control of respondent, the charterer.

Ruttenberg v. Schefer, 131 Fed. 313, 321;
Sturm v. Boken, 150 U. S. 312, 326.

This vessel, under the contract of charter-party, was consigned to charterers' agents on Puget Sound inward and outward, had to clear at the Puget Sound Custom House in the name of the charterers and, after arrival, remained in the care and control of respondent who, by its agents, had both the right and the duty to do the ship's business at Callao. It was quite natural for the owner of a German vessel to make such an arrangement with a charterer who was at home both at Puget Sound and in Callao and therefore in a better position to attend to the affairs of the vessel abroad than the German master who presumably never stayed in a distant port long enough to become familiar with its laws or customs. If, in such a case, the master had refused to deliver the cargo to the consignee who satisfied respondent of his right to receive it, respondent's agent, as general representative of the ship and shipowner, could have ordered the master to deliver it, and could have thus prevented him from enforcing his lien. Even if it be admitted that respondent at Callao would have had no legal right to give such an order to the master, the fact still remains that under such conditions, and with such a provision in the charter-

party, it could have been made very difficult, and practically impossible, for the master to retain the cargo for the protection of his lien, had he otherwise had such a right.

C. Because Under the Charterer's Bill of Lading No Claim Could Be Made Against the Consignees.

By the express stipulations of the charter-party the consignees of the cargo were made liable for the detention in this case; but, leaving the stipulations of the charter-party out of consideration for the moment, the bills of lading issued upon the demand of the charterer, and against the protest of the master, failed to mention the subject of demurrage or damages for which the charterers had become previously liable. But for the express stipulation of the charter-party no claim for damages could have been made against the consignees under such a bill of lading. If the cargo was sold before the arrival at Callao, the consignees had the right to the unqualified possession of the cargo upon arrival, under the bills of lading issued, and could laugh at libelant's damage claim. The principle is laid down in *Dayton v. Parke,* 37 N. E. 642, (1894, Court of Appeal, New York). In that case the bill of lading provided for delivery to the consignee or his assigns, "he or they paying freight as per charter-party", but the bill was silent upon the subject of demurrage. The court said:

> "While a consignee, by accepting the goods consigned to him under a bill of lading by which the person receiving the goods is to pay freight is held bound by an implied contract to pay the freight, yet, *unless the bill of lading either itself or by reference to another instrument, contain also an express condition providing for the payment of demurrage, the consignee, in simply accepting the goods, will not be liable for the payment thereof.* Jesson v. Solly, 4 Taunt. 52; Bruncker v. Scott, id. 1; Evans v. Forster, 1 Barn & Ad. 118; Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334."

If, under such a bill of lading, no demurrage could be claimed from the consignees or their transferees; and if it be true, as contended by proctors for respondent, that the signing of the bill of lading operated the release of respondent from all prior liability, then the shipowners are, of course, left without any recourse whatsoever. But it is clear that the signing of such a bill of lading did not release the respondent; for, under the plain terms of the clause relied on, the charterers were to be released only by making such provision in the bill of lading as would make a settlement of all questions, whether of demurrage or otherwise, possible with the consignees.

III. RESPONDENT IS LIABLE FOR THE DAMAGES AS CONSIGNEE OF THE CARGO, BECAUSE IT IS SO EXPRESSLY STIPULATED IN THE CESSER CLAUSE UPON WHICH RESPONDENT RELIES.

The cesser clause provides:

> "All questions, whether of demurrage or otherwise, *to be settled with the Consignees,*

> the Owners and Captain looking to their lien on the cargo for this purpose."

The consignees are the respondent in this suit; hence, by the agreement in the charter-party, the present question is to be *"settled"* with respondent. Certainly the right to settle with these respondents implies the right to bring an action against them in case they refuse to adjust libelants' claim.

Respondent has heretofore contended that the words: "the owners and captain looking to their liens on the cargo for this purpose" imply that the enforcement of the lien on the cargo is the only method allowed the libelants to settle this question with respondents.

But it is respectfully submitted that there are several conclusive answers to this contention.

(a) In the first place it should be remembered that such a clause, if it purported to restrict libelants in the enforcement of acquired rights by the ordinary legal methods, must be strictly construed against the party contending for such a restriction. If the intention had been to restrict the shipowner to the remedy *in rem* as the *only* remedy, it would have been easy to express such an intention by clear words.

(b) In the second place, the effect of the construction contended for by respondent would be to strike out of the clause the words: "all questions, whether of demurrage or otherwise, to be settled with the consignees." If these words were *omitted,*

the meaning of the remainder of the clause would be precisely what respondent is contending for; but the court is certainly warranted in concluding that the mere fact of the presence of these words makes respondent's construction of the clause forced and unnatural—apart from the principle that, in case of even balance and reasonable doubt, this question must be resolved in libelant's favor. It must be presumed that words which were inserted by respondent in its charter-party have a meaning and a purpose; and, if the meaning and purpose are ambiguous, that meaning must be given to them which maintains libelants' legal rights rather than a meaning which would result in the injustice of leaving libelants without a legal remedy in the face of an undeniable wrong.

(c) In the third place, the natural construction of the words: "All questions to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose", is the following:

The principal agreement is that, if such questions should arise, after the ship and cargo leave the port of loading, the owner of the vessel must settle them at the port of discharge with the consignees. The addition of the words "the owners and captain looking to their lien on the cargo for this purpose" is only a statement of the reason or reasonableness of making such an agreement, pointing out to the shipowner that he is taking a small chance, as his claim against the consignees is *secured* by the lien on the cargo. No obligation is

intended to be placed upon the shipowners by the added words; but this possible, and in most cases more valuable and effective remedy, is added to the other possible remedy of suing the consignees in personam in order to satisfy the shipowners as to security. The purpose of the clause is to inform the shipowner that, after a certain stage in the transaction, he must settle certain claims pending with another party than the charterer, viz. with the consignee, who may be unknown to him; that he is losing nothing by such an arrangement, as he can look to the security of his lien on the cargo.

(d) Any construction whereby libelants would be confined to the remedy in rem, and deprived of their remedy in personam, would have the effect of invalidating the clause, "the owners and captain looking to their lien on the cargo for this purpose" altogether, on the ground that such an agreement would be an attempted ouster of the court's jurisdiction and as such void.

The agreement between shipowner and charterer is plainly that libelants were to settle the present question with respondent consignee. Respondent's argument, on the other hand, is that libelants have no right to settle the question with consignee, but must, if at all, enforce their claim by proceeding against the cargo; that, having failed to proceed against the cargo, libelants have lost their rights and their remedies.

Leaving aside the special agreement made between the parties to this suit in their charter-party,

the general law provides that libelants, in a case of this nature, have two remedies: either to proceed in a purely personal action against respondent, or to file an admiralty suit in rem against respondent's cargo. Any contract to waive either one of these rights or remedies would be against public policy and consequently void. The late Judge De Haven, in the case of *The Tampico,* 151 Fed. 689, in which the writer was interested as proctor, laid down in lucid language the principles upon which we rely in this connection. It was there held that an agreement of waiver, on the part of the libelant, to proceed in rem against a vessel for the recovery of damages to cargo is void, because opposed to public policy. His Honor said (on page 692):

> "The law gives two remedies in a court of admiralty * * * the action in rem against the vessel and an action in personam against the carrier—either one or both of which the shipper has the right to pursue until he has obtained full satisfaction. * * * But parties are not at liberty, when entering into a contract, and as part of it, to agree that, in case of its breach, only one particular remedy shall be pursued, when the law upon considerations of public policy gives more than one."

On this phase of the cesser clause in the charter-party the proper construction of that clause is, therefore, that the parties to it intended that all questions should be settled with the consignees in any legal way open to the parties; that there was no intention to deprive the vessel of any particular right or remedy as against the con-

signees, and that the words "the owners and captain looking to their lien on the cargo for this purpose" were added to point out to the vessel owners the security to which they could look in the settlement of their claim against the consignees.

The consignees in this case are W. R. Grace & Co., respondent.

Resume of the Argument.

Reviewing the argument, it may be well to reconsider briefly the constituent parts of the cesser clause in this case. They are:

(1) *"Vessel to have a lien on cargo for all demurrage."*

"Demurrage" is damage connected with the loading or discharging of cargo.

The detention at Royal Roads was not connected with either loading or discharging and, consequently, was not "demurrage" in the strict sense.

Hence this part of the cesser clause confers no lien upon the cargo for the liability incurred by respondent.

(2) *"All and any liability of the charterers shall cease and determine as soon as the cargo is on board."*

After the cargo was on board, the charterer had still the power to make the alleged lien valueless, either by acts at the loading place

or by acts at the place of discharge. Hence the lien is inadequate.

(3) *"All questions, whether of demurrage or otherwise, to be settled with the consignees".*
The consignees in this case are the respondent in the suit. Hence respondent is liable.

(4) *"the owner and captain looking to their lien on the cargo for this purpose."*
Libelants had no lien on the cargo for the damage suffered by reason of matters arising before loading of the cargo; and
Furthermore this part of the clause is intended only to point out one remedy to which he can look for security.

It is respectfully submitted that the losses which the libelants suffered call loudly for a remedy, and that a just construction of the cesser clause will prevent the denial of justice which would be the result of the decision of the lower court.

Dated, San Francisco,
October 4, 1916.

Andros & Hengstler,
Louis T. Hengstler,
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